IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2355 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KINIT JAYANTILAL AMIN

Versus

STATE OF GUJARAT and Another.

Appearance:

MR KB ANANDJIWALA for Petitioners

PUBLIC PROSECUTOR for opponent No. 1

MR RJ OZA for opponent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/05/99

ORAL JUDGEMENT

Rule. Ms. Katha Gajjar, learned APP for the State of Gujarat and Mr. R.J. Oza, learned advocate for the opponent No.2 waive the service of Rule.

2. The petitioners pray for quashing of the order passed by the learned Additional Sessions Judge, Vadodara, on 8th April 1999 below the application Ex.155 filed in Special Case No. 9/98 on his file whereby request to recall the witness (PW 2) is granted.

Necessary facts may in brief be stated.

3. Against the petitioner a complaint of the offences punishable under Section 18, 22, 29 and 8(c) of the Narcotic Drugs & Psychotropic Substances Act, came to be lodged. At the conclusion of the investigation thereof the chargesheet was filed in the Court of the Additional Sessions Judge, Vadodara which came to be registered as Special Case No. 9/98. After the plea was taken, the prosecution led necessary evidence. The statement of the petitioners under Section 313 of the Criminal Procedure Code was also recorded after the prosecution closed its side. Thereafter, arguments of the parties were heard. Hearing of the arguments was over on 6th April 1999. The case was then adjourned for pronouncement of judgment. Before the judgment could be pronounced the prosecution filed the application Ex. 155 on 8th April 1999 praying that it might be permitted to recall PW 2, Mr. Tomar, Zonal Director, Ahmedabad for further examination as certain facts and documents came to light subsequently. Hearing the parties the learned Addl. Sessions Judge at Baroda on 8th April 1999 allowed the application and ordered to recall Shri Tomar invoking his power under Section 311 of the Criminal Procedure Code. It is against that order the present application is filed challenging the legality and validity thereof.

2. It is the submission of the learned advocate representing the petitioner that for just decision of the case if the court finds to recall and re-examine any witness already examined, it is open to the Court to summon and examine the said witness, but the powers are not to be exercised to permit any of the parties to fill-up the lacuna. In this application, it is not specifically stated for what and why for Mr. Tomar already examined is required to be recalled. The case that the witness is required to be recalled for just decision of the case is not made out, and the same is also not specifically pleaded. A vague application is given so that at any time necessary arguments can be advanced developing the case suitably, and trickily. Such device is required to be frowned upon.

3. The learned advocate representing the opponent No.2 made a lame attempt to support the order passed by the learned Judge, but on query he failed to satisfy the court what were the documents which came to light after the arguments were over and what other facts were required to be brought on record for the just decision in the matter. On behalf of opponent No.1 it is submitted that for just decision in the case the order is rightly

passed which may be maintained.

4. In the application, no specific case is advanced and vaguely it is mentioned that for convenient disposal and also to place some facts brought to light subsequently on record Shri Pawan C. Tomar was required to be recalled. At the time of submission when I made query it was made clear to me that to know what was the weight of the goods seized when sent to laboratory for analysis the witness was to be recalled, and further the statement of Rajendra Kamdar recorded was to be proved & tendered in evidence. It should be noted that such facts were very much there when the charge was framed and plea was recorded. It was in all respects possible for the prosecution to bring the same on record examining the concerned witnesses. The Investigating Officer is examined and the person who despatched the goods to laboratory is also examined. Mr. Tomar who is in know of despatch is no doubt examined but necessary question to bring all the aforesaid facts on record are not put to him. In view of the matter unequivocally it can be said that to fill up the lacuna that remained on record, application Ex. 155 for recalling of Mr. Tomar has been filed, and not for the just decision of the case. When that is so, the powers under Sec. 311, Cr.P.Code cannot be exercised, for the court cannot become the agent of the party, i.e., prosecution exercising the power and affording the opportunity to the prosecution to fill up the lacuna. The Court, without any further facts on record, can well appreciate the evidence already there on record and without any difficulty or confusion, determine the points that have arisen for consideration because the evidence is clear, comprehensive & unambiguous. Every possible link is brought on record. Availing of the opportunity, prosecution, to the best of its ability, led the evidence. If it has missed to bring some thing on record, the Court u/s. 311 cannot help it, because to do so would amount to Court's becoming the agent of the prosecution. Further, entire hearing is over. The case is adjourned for pronouncement of judgment. To allow such application at such stage would amount to miscarriage of justice. For such reasons, therefore, the application is required to be allowed and the order of the lower Court is liable to be quashed. I may, in support of my view, refer some decisions.

5. The High Court of Kerala in the case of Chandran vs. State of Kerala - 1985 Criminal Law Journal 1288 has held that the powers under Sec. 311 of the Criminal Procedure Code to recall or re-examine the witness are to be exercised only when the court is satisfied that

recalling of the witness is for the just decision of the case. Recalling and re-examination of the witness like the Investigating Officer for production and proof of a vital record having great relevance in deciding the guilt of the accused and that too after the conclusion of the evidence cannot be said to be essential for the just decision of the case. If the prayer is granted it may result in miscarriage of justice. In that case the petition was allowed and likewise order was set aside. The Supreme Court in the case of Mir. Mohd. Omar & Ors. v. State of West Bengal AIR 1989 S.C. 1785 has also in the same way held observing that after the evidence of the prosecution is closed and the accused is also examined under Section 313 of the Criminal Procedure Code the prosecution if moves the court for recalling of the witness already examined for further examination and opportunity is given to the prosecution it would amount to miscarriage of justice. In that case the High Court had in Revision granted the liberty which was held improper. In view of this decision making the law clear the impugned order being illegal cannot be maintained. In this case also after the arguments were heard and case was posted for judgment the prosecution has filed the application. If that application is allowed it would amount to miscarriage of justice.

6. For the aforesaid reasons, the impugned order not in consonance with law is required to be set aside. Consequently, this application deserves to be allowed. The same is accordingly allowed. The order passed by the learned Addl. Sessions Judge, Vadodara, on 8th April 1999 below application Ex. 155 in Special Case No. 9/98 on his file granting the prayer to recall and re-examine Shri Tomar is hereby quashed and set aside and the application of the prosecution (Ex. 155) is hereby rejected. Rule accordingly made absolute.

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(rmr).